Before the Federal Communications Commission
Washington, D.C. 20554

In the Matter of)

Federal-State Joint Board on) CC Docket No. 96-45
Universal Service)

REPLY COMMENTS OF THE WYOMING OFFICE OF CONSUMER ADVOCATE

(Submitted March 18, 2005)

The Wyoming Office of Consumer Advocate ("Wyoming OCA") herby files its reply comments in the *Joint Petition of the Wyoming Public Service Commission and the Wyoming Office of Consumer Advocate for Supplemental Federal Universal Service Funds for Customers of Wyoming's Non-rural Incumbent Local Exchange Carrier.* We are responding to the comments of the National Association of State Utility Consumer Advocates (NASUCA) and the joint comments of the Maine Public Utilities Commission (Maine), the Montana Public Service Commission (Montana) and the Vermont Public Service Board (Vermont).

In its comments, NASUCA appropriately comments that the Joint Wyoming Petition is the first request for supplemental federal high cost support under the process that was created by the Federal Communications Commission ("Commission") as a result of its October 27, 2003 Order on Remand.[1] This newly established process was created as part of an expanded certification process, whereby states are to assess the comparability of non-

[1] *Comments of the National Association of State Utility Consumer Advocates Regarding the Joint Wyoming Petition for Supplemental Federal Universal Service Funds for Customers of a Non-Rural Carrier,* filed March 7, 2005, CC Docket no. 96-45, page 2.

rural carrier's rural rates, and certify that the rates are "reasonably comparable[2]." States who are unable to make such a certification, due to the lack of comparability, must explain why comparability has not been achieved and are then permitted to request further federal action, including a request for additional federal universal service support. However, the burden falls on the state to show that it has taken "all reasonably possible steps to achieve reasonable comparability through state action and existing federal support"[3] before asking for additional federal support. The Joint Petition details each of the steps that Wyoming has taken to achieve reasonable comparability, while at the same time implementing national and state policies of creating a competitive environment for the provision of telecommunications services. Thus, the federal supplemental funding should be forthcoming without further delay.

Both the Maine-Montana-Vermont coalition ("States Coalition") comments and the NASUCA comments note that in the midst of the comment period for the Wyoming Joint Petition, the *Qwest II*[4] decision was issued by the United States Court of Appeals for the Tenth Circuit. This decision reversed and remanded the Commission's mechanism for providing federal support to non-rural carriers and specifically remands the definitions of the terms "reasonably comparable" and "sufficient." Yet, in spite of this remand, neither NASUCA nor the States Coalition propose denying Wyoming its supplemental funding.

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[2] Reasonably comparable was defined by the Commission as the national urban average plus two standard deviations. It is currently set at $34.16.

[3] *Order on Remand, further Notice of Proposed Rulemaking, and Memorandum Opinion and Order,* CC Docket No. 96-45, issued October 27, 2003, paragraph 93.

[4] *Qwest v. FCC,* __F.3d__, 2005 WL 419769(10th Cir.,Feb. 23,2005)

As stated in the States Coalition comments, at page 4: "This decision does not provide any reason to deny relief to Wyoming." Similar thoughts are expressed on page 5 of the comments:

> *Qwest II* also provides ample reason for prompt action. It has now been nine years since Congress stated that customers in rural areas are entitled to have rates that are reasonably comparable to urban areas. More than two years have passed between the court's decision in *Qwest I* and the Commission's *Ninth Report Remand Order*, which was issued in late 2003. The fourth anniversary of *Qwest I* now approaches, and still the Commission has not demonstrably provided sufficient support to the customers of nonrural companies. While the issues presented on remand to the Commission are undoubtedly complex, this petition offers an immediate opportunity to provide relief to the ratepayers of high cost nonrural carriers, even while it considers additional responses to *Qwest II.*

The NASUCA comments also support the granting of supplemental federal funds without further delay resulting from *Qwest II.* The NASUCA comments state, at pages 3 and 4:

> *Qwest II* invalidated the benchmark, but upheld the state certification process, including the process by which additional federal support is requested. The Tenth Circuit invalidated the two standard deviation benchmark *because that benchmark was too high,* and would not support enough customers' rates. Any support granted Wyoming based on a lower benchmark would likely be greater than that granted under the two standard deviation benchmark, unless radical changes are made to the process.
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> Thus it makes sense to proceed with addressing the Joint Wyoming Petition, to establish, in this fairly clear instance, standards for addressing future applications under the benchmark ultimately selected. Wyoming has shown that supplemental federal funds are needed to produce rates for Qwest that are reasonably comparable to urban rates, even using the high two standard deviation benchmark…[Footnotes omitted.]

While NASUCA supports the provision of supplemental funds to Wyoming, it does so while questioning the wisdom of some of the actions that Wyoming has taken to prepare for competition. Specifically, NASUCA raises questions about Wyoming's decision to assign all of the cost of the loop to local service, expresses concern about raising local prices in preparation for competition, and points out the lack of a requirement to do away with intrastate implicit support.[5] While we appreciate the conclusion reached by NASUCA, that Wyoming's rates are not reasonable comparable and therefore the first prong of the Commission's supplemental funding test has been met, we also find it important to respond to the questions raised about Wyoming's actions.

First, there is the issue of assigning the entire intrastate portion of the cost of the loop to local exchange service.[6] There is an underlying suggestion that this "draconian" decision should influence the level of supplemental support provided in response to Wyoming's request.[7] We disagree. The decision to assign all of the loop cost to the local service is consistent with the Commission's position as it was expressed at the time of Wyoming's decision[8]. In the Commission's May 16, 1997 order in CC Docket No. 96-262, et al., the Commission stated at paragraph 37:

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[5] NASUCA comments, pages 5 and 6.

[6] While 100% of the cost of the loop is assigned to local exchange service, there is a recognition that the approximately 25% of the cost of the local loop is assigned to the interstate jurisdiction for recovery by interstate service revenues. The interstate portion of the costs are recognized and are netted when determining the Wyoming retail cost and price of local exchange service.

[7] NASUCA's comments at page 8.

[8] NASUCA also suggests that Wyoming's treatment of loop costs could be a violation of section 254(k) of he 1996 Act. We disagree, since loop is treated as a direct cost of local service, and 254(k) addresses treatment of joint and common costs.

> Because the costs of using the incumbent LEC's common line (or "local loop") do not increase with usage, these costs should be recovered through flat, non-traffic-sensitive fees…

This concept was also consistent with the Commission's thoughts in its 2001 Access Charge decision[9]:

> The Commission has long recognized that, to the extent possible, interstate access costs should be recovered in the manner in which they are incurred. In particular, non-traffic sensitive costs – costs that do not vary with the amount of traffic carried over the facilities – should be recovered through fixed, flat charges, and traffic sensitive costs should be recovered through per-minute charges. This approach fosters competition and efficient pricing. The Part 69 rules, however, are not fully consistent with this goal. For example the costs of the common line or loop that connects an end user to a LEC central office should be recovered from the end user through a flat charge, because loop costs do not vary with usage…

This is precisely what Wyoming was thinking when it moved the cost of the loop to the local exchange rate. It was a pro-competitive move that was consistent with the FCC's stated position. The fact that Wyoming dared to take this action early should be seen as a reason to grant our supplemental request, rather than as a reason to reduce the requested support. We implemented national policy at a cost – a cost that continues to be borne by Wyoming customers. With the joint petition, we again ask for full implementation of the stated national policy of having universal service at reasonably comparable rates. We need additional federal assistance to accomplish this Congressional goal.

Second, NASUCA debates the appropriateness of raising local exchange service prices to prepare for competition -- whose end objective is to secure lower prices for consumers. The Wyoming OCA hopes that in the long

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[9] *Second Report and Order and Further Notice of Proposed Rulemaking in CC Docket No. 00-256, Fifteenth Report and Order in CC docket No. 96-45, and Report and Order in CC Docket Nos. 98-77 and 98-166,* released November 8, 2001, at paragraph 17.

run, competition brings lower overall telecommunications bills to customers, as well as more choices and innovative services. But, that cannot be expected to occur while barriers to entry such as below cost pricing and implicit pricing subsidies exist. In order to prepare a competitive arena, prices were moved toward cost. This involved increasing some prices (residential local exchange rates) while reducing a multitude of others (toll rates, switched access charges, and business local exchange rates). Wyoming's reasoning in this regard is again consistent with the logic propounded by the Commission in its May 16, 1997 Access Order at paragraph 30:

> This "patchwork quilt of implicit and explicit subsidies" generates inefficient and undesirable economic behavior…Implicit subsidies also have a disruptive effect on competition, impeding the efficient development of competition in both the local and long-distance markets…

It is important to remember that the entire debate and discussion about the appropriate funding levels for universal service are subsumed in the larger, overall debate about how to implement Congress' desire to "provide for a pro-competitive, deregulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition…"[10] While we continue to hope that the advantages of competition, including price reductions and lower-cost technologies, will someday allow for a reduction or elimination of federal support to Wyoming customers, that day has not yet come. We continue to be in the transitional phase of competitive implementation and Wyoming customers need some additional help to work through the transition phase. We anticipate that our need will not always be so great if, and when, the competitive benefit of reduced prices becomes a reality.

[10] Conference Report accompanying the Telecommunications Act of 1996.

Third, NASUCA cites the *Qwest II* decision as authority that the 1996 Act does not require doing away with intrastate implicit support. Yet, this decision is weeks old, while Wyoming's need has been discussed and debated for more than five years. While we admit that there was no explicit requirement in the federal law to eliminate intrastate explicit subsidies, it only made sense to do so in light of the overarching goal of implementing competition on a national basis. The Act itself is pro-competitive legislation. It contains general provisions prohibiting barriers to entry.[11] Furthermore, intrastate transitions from implicit to explicit subsidies were discussed and expected by the Commission:

> …so the approach we adopt today will allow the Commission to work with the states, both collectively and individually, to ensure that states are able to accomplish their own transition from implicit support to explicit universal service support…[Emphasis added.][12]

While both NASUCA and the States Coalition support supplemental federal funding for Wyoming, both suggest that a reduction in the amount of the requested funds may be in order, particularly absent any special recognition of the decision in *Qwest II*.[13] NASUCA recommends that only 76% of the requested $4.7million be provided, as the remainder should come from the state, consistent with current federal and intrastate support computations. The State Coalition suggests that the requested amount be reduced in recognition of the fact that some of Wyoming's Qwest customers currently pay less that the $34.16 reasonably comparable benchmark. This

[11] Section 253(a) of the Act: "No state or local statue or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of nay entity to provide any interstate or intrastate telecommunications service." [Emphasis added.]

[12] Paragraph 272 of the Commission's May 8, 1997 order in CC docket No. 96-45.

[13] The States Coalition supports a reduction in the requested supplemental funding if measured against the reasonably comparable test of the national urban average plus two standard deviations. However, their comments also suggest that reduced funding would not be necessary if the Commission incorporated in its decision a response to the *Qwest II* decision and reduced the benchmark to a more appropriate level of $26.

reduction is explained as an additional means of assuring that the state does what it can to support its own to the greatest extent possible. While we, again, appreciate the position of both sets of commenters, and appreciate their support for some supplemental funding, their proposed reductions are lacking and should not be adopted.

Our supplemental funding request comes after there has already been a sharing between the state universal service fund, the federal universal service fund, and some of the highest customer rates in the nation. Even if the $4.7 million in supplemental funding were to be provided, it would only reduce Wyoming's local service rate to the extreme outer edge of the Commission's safe harbor range for finding rates to be reasonably comparable. Qwest's customers in Wyoming would continue to pay some of the highest local service rates in the nation, based on our review of the Commission's 2004 *Reference Book of Rates, Price Indices, and Household Expenditure for Telephone Service.* To ask them to pay more is unconscionable and inconsistent with the federal-state partnership anticipated under the 1996 Act. State universal service funds provide Qwest's Wyoming customers with about $2.5 million of annual support. When divided by the total number of basic local exchange access lines in Wyoming, the result is an average of about $.83 per month per access line. Federal universal service high cost funds, before the supplemental request, provide Qwest with about $9.4 million annually.[14] When divided by the number of national subscribers who pay for this support, this translates into less than $.006 per month per subscriber nationally.[15] Wyoming is already

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[14] Based on USAC's Cost Support Projection by Study Area for the 1st quarter of 2005.

[15] Based on about 121.8 million main access line subscribers for Reporting Incumbent Local Exchange Carriers as of December 31, 2003 as reported in the 2003/2004 Edition of the Commission's Statistics of Communications Common Carriers. If all access lines for all carriers were included, the provided support per line would be less than the computed $.006 per line.

paying its fair portion of the cost and a further sharing is neither necessary nor reasonable.

In conclusion, we urge the Commission to immediately move forward with granting additional federal support to Wyoming customers before the issues of the appropriate benchmark level, the definition of sufficient and reasonably comparable, and other important questions on universal service are debated once again. Wyoming has waited at the back of the universal service funding line for too long, while numerous details are addressed and readdressed. Now there is an opportunity to implement the federal-state partnership that has been discussed and promised for so long. We ask the Commission to grant Wyoming's request for supplemental funding in order to bring rates to a reasonably comparable level with those in urban areas.

Respectfully submitted,

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